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September 15, 1994

BY OVERNIGHT MAIL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PR File No. 94-SP6

Dear Mr. Caton:

Enclosed for filing please find an original plus four (4) copies of the Opposition of Rochester Tel Cellular Holding Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter filed herewith for that purpose and return same in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: International Transcription
Service

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Petition To Extend Rate
Regulation Filed by the New
York State Public Service
Commission**

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PR File No. 94-SP6

**OPPOSITION OF ROCHESTER TEL
CELLULAR HOLDING CORPORATION**

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September 15, 1994

Table of Contents

	Page
Summary	ii
Introduction	1
Argument	3
THE NY PSC HAS FAILED TO SUSTAIN ITS BURDEN OF DEMONSTRATING THE NECESSITY FOR CONTINUED RATE REGULATION OF CELLULAR SERVICE	3
A. The "Two-Licensees-Per- Market" Theory Is Meritless	4
B. The "Evidence" Relied Upon by the NY PSC Fails To Sustain Its Burden of Proof	6
1. A Comparison of Landline and Cellular Rates Is Misleading and Irrelevant	6
2. Earned Returns on Common Equity Are Irrelevant	7
3. The NY PSC's Consumer Complaint Analysis Is Irrelevant	8
4. The Successful Resolution of One Roaming Dispute Is Irrelevant	8
C. Continued Rate Regulation Itself Is Anticompetitive	9
Conclusion	10

Summary

RTCHC,¹ on behalf of itself and its affiliated entities engaged in the provision of cellular service within the State of New York, submits this opposition to the petition to extend rate regulation filed by the NY PSC.

In OBRA, Congress preempted state rate and entry regulation of commercial mobile radio services, subject to petitions to extend or retain state rate regulation. The petitioning authority bears the burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates. In relevant part, the petitioning authority must demonstrate that prevailing market conditions will not adequately protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.

The NY PSC has failed to meet the burden necessary to justify the continuation of intrastate rate regulation. At bottom, the NY PSC seeks to continue to regulate cellular rates solely because this Commission has licensed only two facilities-based providers of cellular service. Congress, however, has foreclosed that theory as a basis for the continuation of state rate regulation. Moreover, the specific "facts" that the NY PSC advances to justify retention of jurisdiction fail to support its position. The NY PSC does not prove that rates for cellular service are too high or discriminatory; nor does it demonstrate significant consumer dissatisfaction regarding existing pricing levels. Rather, the NY PSC relies essentially on four irrelevant pieces of information, at least three of

¹ The abbreviations used in this summary are defined in the text.

which fall wholly outside the procedures governing rate re-regulation petitions. The NY PSC points to: (a) a misleading comparison between the rates for cellular service and landline service; (b) rates of return on equity for cellular providers; (c) anecdotal evidence regarding consumer complaints; and (d) one dispute between two cellular carriers that the NY PSC staff supposedly resolved regarding roaming rates. None provide any basis for the continuation of intrastate rate regulation of cellular service. Moreover, the NY PSC ignores the decidedly anticompetitive effects engendered by the existence of rate regulation of cellular carriers.

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**OPPOSITION OF ROCHESTER TEL
CELLULAR HOLDING CORPORATION**

Introduction

Rochester Tel Cellular Holding Corporation ("RTCHC"), on behalf of itself and its affiliated entities engaged in the provision of cellular service within the State of New York,¹ submits this opposition to the petition to extend rate regulation filed by the New York Public Service Commission ("NY PSC").²

In the 1993 Omnibus Budget Reconciliation Act ("OBRA"), Congress preempted state rate and entry regulation of commercial mobile radio services ("CMRS"),³ subject to petitions to extend or retain state rate regulation.⁴ The petitioning authority bears "[t]he

¹ RTCHC, itself or through affiliates currently participates in the provision of cellular service in the Binghamton, Buffalo, Orange/Poughkeepsie, Rochester, Syracuse and Utica-Rome Metropolitan Statistical Areas and New York Rural Service Areas 1, 2 and 3.

² Petition to Extend Rate Regulation (Aug. 5, 1994) ("Petition").

New York was one of only eight states to petition for authority to continue intrastate rate regulation of cellular carriers. See Public Notice, Mimeo 44334, *State Petitions To Retain Authority over Intrastate Mobile Service Rates*, DA 94-876 (Aug. 12, 1994). This overall lack of interest in the continuation of rate regulation of cellular carriers itself speaks volumes about the lack of need for rate regulation.

³ OBRA, § 6002(c)(2)(A).

⁴ 47 U.S.C. § 332(c)(3)(B).

burden of proof that the state has met the statutory basis for the establishment or continuation of state regulation of rates."⁵ In relevant part, the petitioning authority must demonstrate that "prevailing market conditions will not adequately protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."⁶

The NY PSC has failed to meet the burden necessary to justify the continuation of intrastate rate regulation. At bottom, the NY PSC seeks to continue to regulate cellular rates solely because this Commission has licensed only two facilities-based providers of cellular service.⁷ Congress, however, has foreclosed that theory as a basis for the continuation of state rate regulation. Moreover, the specific "facts" that the NY PSC advances to justify retention of jurisdiction fail to support its position. The NY PSC does not prove that rates for cellular service are too high or discriminatory; nor does it demonstrate significant consumer dissatisfaction regarding existing pricing levels. Rather, the NY PSC relies essentially on four irrelevant pieces of information, at least three of which fall wholly outside the procedures governing rate re-regulation petitions.⁸ The NY PSC points to: (a) a misleading comparison between the rates for cellular service and

⁵ *Regulatory Treatment of Mobile Services*, GN Dkt. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1504, ¶ 251 (1994) ("Second Report").

⁶ *Id.*

⁷ See Petition at 3-5.

⁸ See Public Notice, *FCC Announces Procedures Governing State Petitions for Authority To Regulate Commercial Mobile Radio Service Rates*, DA 94-764 (July 8, 1994).

landline service;⁹ (b) rates of return on equity for cellular providers;¹⁰ (c) anecdotal evidence regarding consumer complaints;¹¹ and (d) one dispute between two cellular carriers that the NY PSC staff supposedly resolved¹² regarding roaming rates. None provide any basis for the continuation of intrastate rate regulation of cellular service. Moreover, the NY PSC ignores the decidedly anticompetitive effects engendered by the existence of rate regulation of cellular carriers.

Argument

THE NY PSC HAS FAILED TO SUSTAIN ITS BURDEN OF DEMONSTRATING THE NECESSITY FOR CONTINUED RATE REGULATION OF CELLULAR SERVICE.

Rather than demonstrating, as OBRA requires, that market conditions cannot prevent the emergence of unjust or unreasonable rates, the NY PSC simply asserts that two facilities-based cellular providers cannot, almost by definition, provide an effectively competitive market.¹³ The evidence it relies upon falls far short of the statutory burden for retaining rate regulation. Moreover, the NY PSC completely ignores the directly and profoundly anticompetitive effects that rate regulation casts over the provision of cellular service. The NY PSC's petition should be rejected.

⁹ Petition at 8.

¹⁰ *Id.* at 8-9.

¹¹ *Id.* at 9-11.

¹² *Id.* at 10-11.

¹³ *Id.* at 8.

A. The "Two-Licensees-Per-Market-Theory" Is Meritless.

The NY PSC believes that the allocation of spectrum to only two licensees per market itself precludes the development of effective competition for cellular service. The short answer to this claim is that Congress must have already considered **and rejected** this theory. When Congress enacted OBRA, it obviously knew that only two licensees per market were allocated spectrum to provide cellular service. Nonetheless, it preempted state rate regulation of cellular service.

Therefore, the proviso permitting the continuation of rate regulation upon a showing essentially of market failure must have meant more than the existence of only two licensees per market. Otherwise, Congress' preemption of state rate regulation would have been a meaningless exercise. Rather, the proviso requires a petitioning state authority to demonstrate something unique or unusual about a particular market that has resulted in unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory. The NY PSC has not met this burden.

Moreover, the theory itself is flawed. The antitrust courts have long recognized that a market may be fully competitive even if there are only two market participants.¹⁴ As described in Point C, below, rate regulation unnecessarily constrains the ability of cellular carriers to engage in price competition as aggressively as they otherwise could. However,

¹⁴ See, e.g., *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980).

as a type of *per se* analysis, the NY PSC's "two-to-a-market" theory is logically and economically unsustainable.

RTCHC recognizes that this Commission is reticent to classify cellular -- at this time -- as a non-dominant service.¹⁵ Despite this reticence, this Commission has decided to forbear from rate regulation of cellular carriers' interstate services and, indeed, has ordered cellular carriers to **cancel** their interstate tariffs.¹⁶ The same result should follow for intrastate rate regulation.

Finally, the "two-to-a-market" theory ignores the existence of actual and potential competition from sources not subject to rate regulation. The most obvious current source of such competition is from enhanced specialized mobile radio ("SMR") providers. Such providers -- although now classified as commercial -- will retain their private radio status for a three-year transition period.¹⁷ As such, SMR providers preemptively are not subject to state rate regulation.¹⁸ Nextel -- a large enhanced SMR provider -- has described itself as the third cellular network. Having one group of competitors subject to rate regulation, while another is not is inequitable, anticompetitive, and contrary to the goals of regulatory parity espoused by Congress in OBRA.¹⁹

¹⁵ Second Report, 9 FCC Rcd at 1467-68, 1470-72, ¶¶ 138, 145-54.

¹⁶ *Id.*, 9 FCC Rcd at 1479-80, ¶ 178.

¹⁷ *Id.*, 9 FCC Rcd. at 1513, ¶ 280.

¹⁸ *Id.*, 9 FCC Rcd. at 1414-16, ¶¶ 4-7.

¹⁹ *Id.*, 9 FCC Rcd at 1418, ¶ 13.

The NY PSC's "two-to-a-market" theory is factually, logically and economically unsustainable.

B. The "Evidence" Relied Upon by the NY PSC Fails To Sustain Its Burden of Proof.

The NY PSC relies upon four pieces of information in seeking to justify the continuation of rate regulation: (1) a misleading comparison of landline and cellular rates; (2) earned rates of return of cellular carriers; (3) largely undescribed consumer complaints; and (4) one dispute between two cellular carriers regarding roaming rates. This "evidence" does not sustain the NY PSC's burden of demonstrating the necessity for the continuation of rate regulation of cellular carriers.

1. A Comparison of Landline and Cellular Rates Is Misleading and Irrelevant.

The NY PSC asserts that cellular rates are approximately nine times higher than rates for landline service.²⁰ The inference that the NY PSC wishes to draw -- namely, that rates for cellular service are too high -- is not accurate.²¹ Rates for landline service in New York -- particularly for basic residential exchange service -- are typically priced under cost, at the behest and direction of the NY PSC. Thus, even if such a wide differential exists, at least a portion of that result is directly attributable to NY PSC regulation of local

²⁰ Petition at 8 n.1.

²¹ Curiously, the citation to a Merrill/Lynch report for this statistic does not even indicate that it is specific to New York State or to any of the cellular service areas within the State.

exchange service. Moreover, as the NY PSC itself acknowledges, "overall average [cellular] prices are declining."²²

2. Earned Returns on Common Equity Are Irrelevant.

Returns on common equity say nothing about the reasonableness of particular price levels. The NY PSC does not correlate the two. High (and low) returns may be generated by any number of factors. These include life-cycle (years in the market), efficiency, cost structures and the like, none of which the NY PSC even addresses. Moreover, the lack of relevance of earned rates of return is underscored by the fact that the NY PSC has never subjected cellular carriers to traditional cost-of-service regulation.

Second, the market comparisons that the NY PSC attempts to draw²³ are misleading. Exchange carriers in New York are largely subject to traditional cost-of-service regulation for which authorized returns are relatively low. The comparison also ignores the fundamentally risky nature of cellular operations. Finally, the comparison ignores the much more highly leveraged capital structures typical to cellular operations, as compared to local exchange operations.²⁴

²² *Id.* at 8.

The NY PSC's further observation that market shares vary widely among service areas (*id.* at 9) is economically irrelevant. With additional capital investment in its network and innovative pricing, the market loser could quickly gain market share. The existence of even one substitute provider is a powerful incentive against pricing a service unreasonably high.

²³ See Petition at 8-9.

²⁴ The NY PSC's comparison of cellular operations to unregulated high tech companies (*id.* at 9 & App. 2) suffers from each of these flaws, save the existence of regulation.

3. The NY PSC's Consumer Complaint Analysis Is Irrelevant.

The NY PSC cites to 146 consumer complaints as evidence of the necessity for the continuation of rate regulation. While it asserts that 66 of these complaints are rate-related,²⁵ it is not clear how accurate that portrayal is. "[E]xcessive, erroneous, or disputed bills"²⁶ may have nothing to do with rate levels *per se*; they may well involve other questions. While the NY PSC admits that "[t]he complaint level is low,"²⁷ it fails to inform this Commission how low or how many of those complaints are truly related to rate levels. This is far too slender a reed upon which to justify continued rate regulation of cellular carriers.

4. The Successful Resolution of One Roaming Dispute Is Irrelevant.

The NY PSC points to its ability to resolve **one** dispute between two non-wireline cellular carriers concerning roaming rates as the basis for its claim that continued rate regulation of cellular services provided to end users is necessary.²⁸ That this is a *non sequitur* is rather obvious.²⁹ Moreover, one dispute between two cellular carriers over the

²⁵ *Id.* at 9.

²⁶ *Id.*

²⁷ *Id.* at 9-10.

²⁸ *Id.* at 10-11.

²⁹ In addition, the NY PSC's assertion that it persuaded one carrier to withdraw one particular association plan (*id.* at 10) demonstrates only the perception of that plan in the eyes of the Staff of the NY PSC. It says nothing of the reasonableness of the plan and it certainly does not demonstrate that "[c]ontinued regulation is necessary to ensure a seamless network and access to emergency services." *Id.*

ten-year history of the provision of cellular service within the State dramatically underscores the lack of any need for a continuation of intrastate rate regulation.

**C. Continued Rate Regulation Itself
Is Anticompetitive.**

What the NY PSC has said about the need to continue rate regulation of cellular carriers does not suffice to carry its burden. What it fails to say convincingly demonstrates that the petition should be denied.

As the NY PSC describes,³⁰ its rate regulation of cellular carriers is essentially light.³¹ Particularly troubling about continued rate regulation of cellular service is the price-signalling opportunities it affords. Because cellular carriers must file new service plans on extended notice, a particular carrier's competitors are provided ample advance notice of changes in service offerings and pricing strategies. Even within-range filings -- although filed on only one day's notice -- provide competitors with notice of changes in market behavior prior to the time they would have otherwise received such information.

This type of price-signalling itself is suspect on antitrust grounds, as it can facilitate implicit, if not explicit, collusion among competitors.³² Worse, it places cellular carriers in the position of potentially having to defend pricing decisions to competitors in an area

³⁰ *Id.* at 6-7.

³¹ Nonetheless, such regulation can occasion delay in introducing new services that fall outside existing pricing bands.

³² See, e.g., *United States v. Container Corp.*, 393 U.S. 333 (1969).

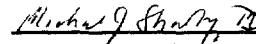
where antitrust immunity arguably does not exist, due to the lack of active state supervision.³³

Continuation of rate regulation of cellular carriers may, perversely, defeat the very goals that the NY PSC espouses. The NY PSC has failed to carry its burden of proof to demonstrate that continued rate regulation of cellular carriers is warranted.³⁴

Conclusion

For the foregoing reasons, this Commission should dismiss the petition of the NY PSC.

Respectfully submitted,


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September 15, 1994

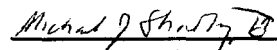
³³ See, e.g., I P. Areeda & D. Turner, *Antitrust Law*, ¶ 213f (1978).

³⁴ Because state rate regulation continues until this Commission acts upon the petition, RTCHC respectfully requests that this Commission dismiss the petition as expeditiously as possible.

Certificate of Service

I hereby certify that, on this 15th day of September, 1994, a copy of the foregoing Opposition of Rochester Tel Cellular Holding Corporation was served by first-class mail, postage prepaid, upon:

Penny Rubin, Esq.
State of New York
Department of Public Service
Three Empire State Plaza
Albany, NY 12223


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